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FEDERAL COMMUNICATIONS COMMISSION APR 21 1997

Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

MARC SOBEL

Applicant for Certain Part 90 Authorizations
in the Los Angeles Area and Requestor of
Certain Finder's Preferences

MARC SOBEL & MARC SOBEL d/b/a
AIR WAVE COMMUNICATIONS

Licensee of Certain Part 90 Stations in the
Los Angeles Area

WT DOCKET No. 97-56

OPPOSITION TO THE BUREAU'S
MOTION TO ENLARGE ISSUES

To: The Honorable John M. Frysiak
Presiding Administrative Law Judge

Marc D. Sobel d/b/a Air Wave Communications, by his attorney, hereby opposes the *Wireless Telecommunications Bureau's Motion to Enlarge Issues* filed in this proceeding on 3 April 1997.

A. Introduction

1. The Bureau seeks to add a misrepresentation or lack of candor issue against Sobel solely on the basis of an *Affidavit* executed by Mr. Sobel on 24 January 1995. The Bureau contends that the statement in the *Affidavit* that "Mr. Kay has no interest in any radio station of which [Mr. Sobel] is the licensee" can not be reconciled with the terms of the 30 December 1994 management agreement between Messrs. Sobel and Kay. *Motion to Enlarge* at ¶ 5. The Motion to Compel should be rejected on procedural grounds because it asks the presiding officer to revisit a matter already considered by the Commission. Alternatively, the Motion should be denied on the merits because there is no evidence that Sobel has ever misrepresented facts to or concealed facts from the Commission.

B. The Motion is Procedurally Improper.

2. The Commission has been investigating the relationship between Mr. Sobel and Mr. Kay since sometime before 1994. In initially designating the Kay matter for hearing, the Commission apparently labored under the misconception that Mr. Sobel, rather than being a real individual separate and apart

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from James Kay, was instead a mere fictitious name allegedly used by Kay to thwart Commission policy. The Commission stated in the designation order: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions We believe these names include . . . Air Wave Communications [and] Marc Sobel dba Airwave Communications."¹ When it became clear that this was a gross misperception, the Bureau sought the removal of Sobel's licenses from the scope of the Kay proceeding, stating "the full nature and extent of the relationship that . . . Sobel may have with Kay is unknown, and, in the Bureau's opinion, should be explored, at least initially, in the context of a non-adjudicatory investigation."² The Commission agreed and, on 8 May 1996, removed Sobel's licenses from the scope of the Kay hearing proceeding. In so doing, the Commission echoed the words of the Bureau's request: "Given the uncertain relationship between [Sobel] and Kay, there is no reason at this time to subject [Sobel] to possible sanctions or to encumber this proceeding with [his] participation. If further investigation discloses pertinent questions concerning [Sobel], the Bureau may take further appropriate steps."³ Significantly, the Bureau's request to remove Sobel and the Commission's ruling doing so came well after the Sobel *Affidavit* now at issue had been submitted.

3. After Sobel's removal from the Kay proceeding, the Bureau actively investigated the relationship between Sobel and Kay for another nine months before this proceeding was designated. On 27 January 1997, nearly nine months after Sobel had been removed from the Kay hearing and a full two years after the *Affidavit* had been submitted, the Commission advised the United States Court of Appeals

¹ Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("Hearing Designation Order") (FCC 94-315; PR Docket No. 94-147), 76 Rad. Reg. 2d (P&F) 1393 at ¶ 3 (1994).

² Wireless Telecommunications Bureau's Request for Clarification at pp. 3-4 ¶ 4, WT Docket No. 94-147 (filed 6 March 1996).

³ Order (FCC 96-200; WT Docket No. 94-147) at ¶ 6 (released 8 May 1996).

for the District of Columbia Circuit that "Sobel has been the subject of an ongoing investigation, particularly with respect to his relationship with ... James A. Kay, Jr."⁴

4. The information on which the Bureau now seeks to base its request for enlargement of the issues, namely, the Sobel Affidavit, has been in the Bureau's possession since January of 1995. The Bureau has had this item in the context of a case that it has been actively and aggressively prosecuting against Kay. Even after Sobel was removed from the Kay proceeding, the Bureau and Commission staff spent another nine months investigating Sobel, "particularly with respect to his relationship with ... Kay," an investigation that culminated in the designation of this proceeding. Yet, notwithstanding this extensive investigation that focused in particular on the relationship between Kay and Sobel; notwithstanding the particular focus of the investigation on the management agreement between Sobel and Kay; notwithstanding the fact that the Sobel Affidavit was before the Commission as it conducted this investigation, and in a case being actively and aggressively prosecuted by the same staff members who were conducting the Sobel investigation; and notwithstanding the Commission's determination that there were questions as to Sobel's basic qualifications as a direct result of the management agreement; the Commission nevertheless did not see fit to designate an issue whether, by the Affidavit or otherwise, Sobel misrepresented facts to or withheld facts from the Commission regarding the agreement. It would thus be inappropriate for the presiding judge to do so now solely on the basis of information that was already before the Commission during the investigation leading to the designation of this proceeding.⁵

⁴ FCC Opposition to Petition for Writ of Mandamus at p. 2; In re Marc D. Sobel d/b/a Air Wave Communications (D.C. Cir., Case No. 96-131; filed 27 January 1997).

⁵ See *Atlantic Broadcasting Co.*, 4 FCC 2d 943, 8 RR 2d 599 (Rev. Bd., 1966); *Marvin C. Hanz*, 21 FCC 2d 420, 18 RR 2d 310 (Rev. Bd., 1970); *Circle L, Inc.*, 2 FCC 2d 597, 6 RR 2d 795 (Rev. Bd., 1966). After adoption of the hearing designation in the captioned proceeding, but prior to its release and therefore before it was effective, Sobel met with Bureau personnel in an effort to have the effectiveness of the order stayed to allow for negotiation of an informal resolution or consent agreement. The Bureau rejected this overture, advising Sobel that the Commission had fully considered all of the information before it and would be extremely unlikely to revisit its decision to designate the hearing. If the Commission had so carefully considered all of the information that it was unwilling to suffer even a temporary delay that might have resolved the matter without the need for litigation, it is inconceivable that it would not have designated a candor or misrepresentation issue if it had considered one appropriate on the basis of the information before it.

C. The Motion Fails on the Merits.

5. The Bureau does not to question the veracity of most of the statements made in Mr. Sobel's 24 January 1995 *Affidavit*. The assertions that (a) "Marc Sobel [is] an individual, entirely separate and apart in existence and identity from James A. Kay, Jr."; (b) "Mr. Kay does not do business in [Mr. Sobel's] name and [Mr. Sobel] do[es] not do business in [Mr. Kay's] name"; (c) Mr. Sobel has "no interest in any radio station of which Mr. Kay is the licensee"; (d) Mr. Sobel is "not an employer or employee of Mr. Kay, [is] not a partner with Mr. Kay in any enterprise, and [is] not a shareholder in any corporation in which Mr. Kay also holds an interest;" and (e) Mr. Sobel is "not related to Mr. Kay in any way by birth or marriage"; are not challenged by the Bureau.

6. The Bureau's allegation of misrepresentation and lack of candor on the part of Sobel is based on a single sentence in the Affidavit, namely: "Mr. Kay has no interest in any radio station or license of which [Mr. Sobel is] the licensee." The Bureau asserts that this is a false statement because a 30 December 1996 agreement "vests in Kay substantial present and future interests in Sobel's stations and licenses." *Motion to Enlarge* at 5. But the Bureau has presented absolutely no evidence to support its assertion that Mr. Sobel's statement is inaccurate or false,⁶ much less that he intended to mislead the Commission in any way by making it. Attached hereto is a declaration executed by Mr. Sobel under penalty of perjury. Mr. Sobel expressly states therein that he believed each statement in the declaration, including the one about Mr. Kay's not having any interest in Mr. Sobel's stations, to be true at the time he made them and that he believes them to remain true today.

⁶ The Bureau's allegation that the Sobel statement is inconsistent with the 30 December 1994 is actually a matter of legal dispute, not a question of factual accuracy. The Bureau apparently believes, although this point is not made clear in the *Motion to Enlarge*, that Mr. Kay has an "interest" in Mr. Sobel's stations because the management agreement purports to give Mr. Kay an option to acquire the stations. But a mere option, unless it is exercised, does not rise to the level of an actual ownership interest cognizable for most purposes under FCC regulation and policy, including questions of real party in interest and transfer of control. *Turner Broadcasting System, Inc.*, 101 FCC 2d 843, 849 (1985); *Miller Communications, Inc.*, 3 FCC Rcd 6477, 6479 (Mob. Serv. Div. 1988).

7. Mr. Sobel had no intention of concealing his relationship with Kay. He was merely attempting to correct an inaccurate statement in the Kay hearing designation that he did not exist as a separate individual, but was rather a fictitious name being used by Kay.⁷ Not only was it never Mr. Sobel's intention to conceal his business relationship with Kay, it was his understanding and belief that Bureau staff already knew the pertinent details. Insofar as Mr. Sobel's licenses had been mistakenly listed among the Kay licenses to be revoked, Mr. Sobel was well aware that the full extent of Mr. Kay's relationship to those particular stations was being explored in detail in a hearing proceeding that was already under way. In fact, Mr. Sobel believed, at the time he executed the Affidavit, that a copy of his written agreement with Kay had already been provided to the Bureau in discovery.⁸ To find that the Affidavit constitutes misrepresentation or lack of candor, one would have to find it credible that Mr. Sobel would have been foolish enough to deny his agreement with Kay when he believed the Commission to be in possession of the written agreement and knew the entire matter would be examined in detail in the ongoing hearing proceeding.

8. It is obvious Mr. Sobel made no misrepresentation and withheld no facts. He stated what he honestly believed, and still believes, to be the case, namely, that Mr. Kay has no interest in any of Mr. Sobel's stations. The assertion that he was somehow lying or obfuscating can not be squared with his numerous other statements and attempts to communicate with the Commission. For the past three years Mr. Sobel has been attempting to resolve a stalemate with the Bureau on the processing of his many pending applications and requests. He learned as early as 1994, that Commission staff was delaying action on many of my filings, and that this had something to do with an investigation of Mr. Kay, but he was never fully and clearly informed of the nature of the Commission's concern. In late 1995 he retained

⁷ See ¶ 2, above.

⁸ Mr. Sobel was aware that Kay intended to produce a copy of the agreement in response to Bureau discovery requests, and assumed this had already been done. It appears that the actual document production may not have taken place until sometime shortly after Mr. Sobel's Affidavit. Sobel has attempted in discovery in this proceeding to determine precisely when the Bureau became aware of and received a copy of the agreement, but the Bureau has thus far refused to provide such information.

new communications counsel who was charged with stepping up efforts to resolve the problem. Starting in early 1996, Mr. Sobel repeatedly conveyed to Commission staff his willingness to come to Washington DC and/or Gettysburg PA to meet with Commission personnel, to answer any questions, and to provide any information necessary to resolve my matter.

9. One such occasion was during a telephone conference call taking place sometime in February (or possibly in very early March) 1996. The participants were Mr. Sobel's undersigned communications counsel and at least three members of the Commission staff, including Messrs. Gary Schonman and William Kellett and Ms. Anne Marie Wypijewski. When asked during this call about the nature of Mr. Sobel's business relationship with Mr. Kay, Mr. Keller stated that Kay managed some, but not all, of Sobel's stations. When asked if there was a written management agreement, Mr. Keller stated that there was such an agreement and that he believed the Bureau had already obtained a copy of it during discovery in the Kay proceeding.

10. On two different occasions the Bureau served Sobel with requests for information, pursuant to Section 308(b) of the Communications Act, asking for details about his licenses and his relationship with Mr. Kay. The first such request was dated 19 January 1996. Through communications counsel, Mr. Sobel advised Bureau staff that he intended to timely and fully answer the request, but the Bureau inexplicably withdrew the request on 22 February 1996. On 11 June 1996 the Bureau sent a second 308(b) request which Mr. Sobel fully and candidly answered this request, including a copy of the management agreement between me and Kay.

D. Conclusion

11. There clearly has been no attempt by Mr. Sobel to withhold information or mislead the Commission in any way. The Affidavit relied on by the Bureau is an honest statement of the facts as Mr. Sobel believes them. To the extent there is any ambiguity, the context in which the Affidavit is offered and the forthright nature of all other communications by Mr. Sobel dicates in his favor on this question. Finally, the information on which the Bureau bases its request was before the Commission when it designated

this proceeding, and the Commission's determination not to designate a misrepresentation or candor issue at that time should not now be second guessed.

WHEREFORE, it is respectfully requested that the *Wireless Telecommunications Bureau's Motion to Enlarge Issues* be dismissed or denied.

Dated this 21st day of April, 1997

A handwritten signature in black ink, reading "Robert J. Keller", written over a horizontal line.

By: Robert J. Keller
Its Attorney

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WT DOCKET No. 97-56

DECLARATION OF MARC D. SOBEL

I, Marc D. Sobel, state the following:

1. On 24 January 1995, I dated and signed a document entitled *Affidavit*, a copy of which was attached to the *Wireless Telecommunications Bureau's Motion to Enlarge Issues ("Motion to Enlarge")* filed in this proceeding on 3 April 1997.
2. I believed the statements made in the *Affidavit* to be true and correct at that time, and I believe that they have remained true at all times since and are still true today.
3. I stated in the *Affidavit*: "I, Marc Sobel, am an individual, entirely separate and apart in existence and identity from James A. Kay, Jr." That was, has been, and remains a true and accurate statement.
4. I further stated in the *Affidavit*: "Mr. Kay does not do business in my name and I do not do business in his name." That was, has been, and remains a true and accurate statement.
5. I further stated in the *Affidavit*: "Mr. Kay has no interest in any radio station or license of which I am the licensee." As I understand the meaning of that statement, it was, has been, and remains a true and accurate statement. The Bureau apparently interprets the meaning of this statement differently. See ¶¶ 8-17, below.
6. I further stated in the *Affidavit*: "I have no interest in any radio station of which Mr. Kay is the licensee." That was, has been, and remains a true and accurate statement.
7. I further stated in the *Affidavit*: "I am not an employer or employee of Mr. Kay, am not a partner with Mr. Kay in any enterprise, and am not a shareholder in any corporation in which Mr. Kay also holds an interest." That was, has been, and remains a true and accurate statement.
8. I further stated in the *Affidavit*: "I am not related to Mr. Kay in any way by birth or marriage." That was, has been, and remains a true and accurate statement.

9. The Bureau's assertion that I have misrepresented material facts to or lacked candor with the Commission is based solely on a misinterpretation by the Bureau of one sentence in the *Affidavit*. I stated in the *Affidavit*: "Mr. Kay has no interest in any radio station or license of which I am the licensee." The Bureau asserts that this is a false statement because a 30 December 1996 agreement between me and Mr. Kay "vests in Kay substantial present and future interests in Sobel's stations and licenses." *Motion to Enlarge* at ¶ 5.
10. In using the words "Mr. Kay has no interest," I intended to, and did, make the truthful statement that Mr. Kay did not have any **ownership** interest in or **control** of any of my stations. I did not intend to imply that there was **no** relationship or involvement whatsoever between me and Mr. Kay regarding my stations, and I had no intention of concealing any such relationship. I simply did not consider the business arrangement between me and Kay as one that gave him an "interest" in any of my stations.
11. At the time I executed the *Affidavit*, it was my understanding and belief that a copy of the written agreement between me and Mr. Kay had been or would shortly be provided to the Commission as part of discovery in connection with Mr. Kay's hearing proceeding. I was also aware that the extent of Mr. Kay's involvement with some of my stations would likely be explored in detail during the course of Mr. Kay's hearing insofar as call signs for some of my stations were included in the list of stations at issue in the hearing designation order for Mr. Kay's proceeding. Even if I had wanted to be dishonest, which I did not, I am not foolish enough to have made statements to the Commission that directly contradicted a written agreement I believed to be in the Commission's possession and as to a matter which I believed the Commission to be actively investigating in detail.
12. The Bureau asserts that my statement is incorrect because the agreement "vests in Kay substantial ... *future* interests in Sobel's stations and licenses." *Motion to Enlarge* at ¶ 5 (emphasis added). I have been advised by counsel that in using the term "future" interests the Bureau may be referring to a provision in the agreement purporting to give Mr. Kay an option to acquire stations. I am not a lawyer and therefore may not fully understand the technical meaning certain words have for a lawyer. But it has always been my understanding that if I grant an option or right of first refusal to another person to acquire one or more of my stations, (a) such right does not take effect unless it is first exercised by the holder, (b) before the holder may exercise such a right and acquire any license from me, an assignment of license application would have to be filed with and granted by the FCC, and (c) even if the FCC approved such an assignment of license, I would continue to hold and own the license until such time as the deal involving the assignment or acquisition were closed.
13. Perhaps the term "interest" has a different or more precise meaning to lawyers, but I interpret it to mean a current ownership interest, e.g., stock in a corporation, a partnership share, or outright ownership. But for the reasons just stated in the previous paragraph, I do not consider "option" that may or may not be exercised in the future and which will, in any event, require prior Commission approval to be exercised, to be an "interest" in my station, and certainly not an interest sufficient to allow the Commission to revoke my licenses because of a problem they might have with Mr. Kay (see ¶ 13, below).

14. The context in which the *Affidavit* was offered is also important to a determination of what I meant by the statements contained in it. The pleading in connection with which the *Affidavit* was submitted requested, among many other things having nothing to do with me, that the call signs for licenses held by me be excluded from the James A. Kay, Jr. license revocation proceedings.¹ In the hearing designation order in the Kay proceeding, the Commission listed eleven of my licenses, incorrectly stating that they were held by Kay. The Commission appeared to be under the false impression that I did not exist, but was rather a fictitious name being used by Kay. Paragraph 3 of the Kay hearing designation order states: "Information available to the Commission also indicates that James A. Kay, Jr. may have conducted business under a number of names. Kay could use multiple names to thwart our channel sharing and recovery provisions We believe these names include . . . Air Wave Communications [and] Marc Sobel dba Airwave Communications." The Commission presumed such an identity of interest between me and Mr. Kay that it presumed to revoke my licenses without ever giving me notice of the fact, apparently believing notice only to Mr. Kay was adequate. It was that sort of "interest" in my stations that I intended to deny when I executed the *Affidavit*.
15. The contention that, in the *Affidavit*, I misrepresented or concealed facts regarding my relationship with Mr. Kay, can not be squared with my numerous other statements and attempts to communicate with the Commission. For the past three years I have been attempting to resolve a stalemate with the FCC on the processing of my many pending applications and requests. It was my understanding, as early as 1994, that Commission staff was delaying action on many of my filings, and that this had something to do with its investigation of Mr. Kay, but I was never fully and clearly informed of precisely what the Commission's concern was. In late 1995 I retained new communications counsel and advised him to step up the efforts to determine the nature of the Commission's concern with me, the reasons for the freeze on the processing of my pending matters, and to attempt to resolve the matter. Starting in early 1996, through counsel, I repeatedly conveyed to Commission staff my willingness to come to Washington DC and/or Gettysburg PA to meet with Commission personnel, to answer any questions, and to provide any information necessary to resolve my matter.
16. One specific time my desire and willingness to cooperate was communicated to Commission staff was during a telephone conference call taking place sometime in February (or possibly in very early March) 1996. The participants were my communications counsel, Mr. Keller, and at least three members of the Commission staff, including Messrs. Gary Schonman and William Kellett and Ms. Anne Marie Wypijewski. During this call Mr. Keller was asked specifically about the nature of my business relationship with Mr. Kay. Mr. Keller stated that Mr. Kay managed some of my stations. When asked if there was a written management agreement between me and Mr. Kay, Mr. Keller stated that there was such an agreement and that he believed the Bureau had already obtained a copy of it during discovery in the Kay proceeding.
17. On two different occasions the Bureau served me with requests for information, pursuant to Section 308(b) of the Communications Act, asking for details about my licenses and my relationship with Mr. Kay. The first such request was dated 19 January 1996. Through communications counsel, I informally advised Bureau staff that I intended to timely and fully answer the request. On 22 February 1996 the Bureau sent me a letter withdrawing its requests. On 11 June 1996 the Bureau sent a second 308(b) request. I fully and candidly answered this request, including a copy of the management agreement between me and Kay.

¹ WT Docket No. 94-147, *Motion to Enlarge, Change or Delete Issues* at pp. 4-5 (filed by James A. Kay, Jr. on 25 January 1995).

18. When viewed in the context of this history, it is clear that the statements I made in the *Affidavit* were not intended to mislead or deceive the Commission in any way. If I used terminology that was misunderstood by Commission staff, the information already available to the Commission and my subsequent statements should have made clear what was actually intended. Moreover, had the Bureau staff responded to my offers to meet in an effort to resolve matters informally rather than rushing headlong into a hearing, the Bureau's misunderstanding of my words would have been corrected long ago.
19. To summarize, I did not intend, by stating that Mr. Kay had no interest in my stations, to conceal any aspect of the agreement between me and Mr. Kay. I simply meant to state that Kay has assumed neither ownership of or control over stations licensed to me. That was true then and remains true now. I obviously had no intention of concealing or contradicting the agreement between Mr. Kay and me, because it was my belief at the time that the Commission was already aware of and had a copy of the written contract and would be further investigating the matter in detail in connection with Kay's revocation proceeding. Moreover, my consistent conduct has not been that of one attempting to lie to or conceal facts from the Commission. I have repeatedly offered to meet informally with Commission staff and to provide other information about my operations, including my relationship with Mr. Kay. When specifically asked for information by Commission staff, I provided it in timely fashion, including a copy of the written agreement. I have at all times been fully honest and candid with the Commission.

I declare under penalty of perjury under the laws of California and of the United States of America that the foregoing is true and correct to the best of my personal knowledge.

Subscribed by me this 20th day of April, 1997.

Marc D. Sobel

NOTE: AN EXECUTED COPY OF THIS DECLARATION WILL BE FILED UPON RECEIPT BY COUNSEL.

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 21st day of April, 1997, I caused copies of the foregoing *OPPOSITION TO THE BUREAU'S MOTION TO ENLARGE ISSUES* to be sent by first class United States mail, postage prepaid, except as otherwise indicated below, to the presiding officer and the parties in WT Docket No. 97-56, as follows:

HON JOHN M FRYSIK
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